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No. 00-647

In The

Supreme Court of the United States

CHARLES SULLIVAN D/B/A
SULLIVAN MACHINE & TOOL COMPANY,

Petitioner,

vs.

MAZAK CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Summary of the Argument

The petition herein should be denied for at least two reasons. First, the relief sought, (i.e. an implied civil remedy under the Tariff Act of 1930, 19 U.S.C. § 1304), violates the exclusive province of Congress to "lay and collect Taxes, Duties, Imposts and Excises . . ." and that such Duties, Imposts and Excises "shall be uniform throughout the United States" as set forth in the United States Constitution, Article I, § 8, Cl. 1. Second, the Tariff Act of 1930, 19 U.S.C. § 1304 which carries criminal sanctions does not meet the four requirements set forth in *Cort v. Ash*, 422 U.S. 66 (1975) for a private civil remedy to be allowed.

Petitioner's Claim For Relief Violates The United States Constitution, Article I, § 8, Cl. 1

Article I, § 8, Cl. 1 of the United States Constitution provides that,

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"

The Tariff Act of 1930, Pub. L. 71-361, Chapter 497, 46 Stat. 590, ("The Act") is "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American

labor, and for other purposes." Clearly, "The Act" is a direct delegation of authority to Congress under Article I, § 8, Cl. 1. Congress, and Congress alone, has the authority to levy and collect, Taxes, Duties, Imposts and Excises on goods imported into the United States. However, Sullivan in his petition seeks to advance a claim for recovery of an implied private civil remedy under "The Act" which is in the nature of a "Duty" or "Impost." Such relief, is improper under the Constitution.[1]

Even if Sullivan were correct, and Mazak strongly contends that he is not, that Mazak violated the marking requirements of "The Act," as found in § 1304, there is a tremendous need for uniform implementation, administration and enforcement of "The Act" and the regulations promulgated thereunder throughout the United States.[2] The need for such uniformity was recognized by Congress, in that, the Secretary of the Treasury was vested

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[1] Additionally, we have not found a single case that has allowed a private civil remedy under § 1304 of the Tariff Act of 1930 in the 70 years since its adoption.

[2] Sullivan presented evidence at trial, which was met with countervailing evidence, that Mazak did import a machine center from Japan into the United States and then after its arrival in this country, changed the markings on the machine to indicate that it was "Made in the USA." (See Petition herein pp. 12-18). Mazak's evidence at trial was that several components of the machine were manufactured in Japan, properly marked with their country of origin, imported into the United States, transported to its Kentucky plant, and there assembled along with other parts manufactured in the United States, with the machine center then marked "Made in the USA." (R857-R866). There has been no finding by the Secretary of the Treasury, the Customs Service, any government agency or any court of law that Mazak violated § 1304.

with the responsibility to adopt, administer and enforce by regulations the provisions of "The Act." 19 U.S.C. § 1304.

To allow a private civil remedy under "The Act," for violations of its marking requirements would create a "hodge-podge" of different results. State courts and juries would be called upon to decide what constitutes a sufficient marking of the country of origin. For example, they would be asked to decide where the marking should be placed on the imported good or article, the proper language to employ in the marking, the size of the lettering of the marking, and other similar questions. The results would be disparate and uniformity of application and enforcement of "The Act" forever lost. Allowing a civil remedy would be particularly egregious and wrong in this case where there has been no charge or finding of criminal wrong doing under "The Act" by Mazak.

For the foregoing reasons, the civil remedy sought by Sullivan constitutes a clear violation of Article I, § 8, Cl. 1, of the Constitution and his Petition for Writ of Certiorari is due to be denied.

There Is No Right To a Civil Remedy Because "The Act" Does Not Meet the Four Part *Cort. v. Ash* Test

For an implied right to a civil recovery under a federal criminal statute, the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), set forth the following four point test that must be met:

1. There must be a clearly articulated federal right in the plaintiff;

2. The legislative history of the act must suggest a Congressional intent to vest a federal right to damage for violation of the statute;

3. A private civil remedy must further the statutory purpose;

4. The cause of action is not one traditionally relegated to state law in an area primarily of state concern.

Sullivan's claim that 19 U.S.C. § 1304 gives an implied civil remedy fails to meet each of the four points of the *Cort v. Ash* Test.

There Is No Clearly Articulated Right To a Civil Remedy

An unbiased reading of 19 U.S.C. § 1304 makes clear that Congress, mindful of its Constitutional mandate to "lay and collect Taxes, Duties, Imposts and Excises," had no intention to grant a private civil remedy for its violation. In fact, § 1304(h) expressly provides its own civil remedy in the nature of liquidated damages in the amount of an additional 10% duty for a marking violation. This civil damage is in addition to the criminal penalties set forth in § 1304 (k). In the law of contracts, if an express contract exists, a court or a jury is forbidden to construct an implied contract between the parties. Similarly, since Congress set forth a civil remedy for violation of § 1304; an implied civil remedy cannot exist.

Additionally, Congress provided extensive civil remedies in 19 U.S.C. § 1592 when by fraud, gross negligence or negligence the United States is deprived of the lawful duty owed on imported goods. These are remedies

given to the United States and not private litigants like Sullivan. The United States Court of International Trade so held in *Dennison Manufacturing Company v. United States Department of The Treasury*, 678 F. Supp. 984 (CIT 1988). There, an importer, Dennison, brought a pre-emptive action against the government challenging an adverse customs determination. The Court of Trade dismissed the complaint. The court held that "The Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1982) . . . provides for civil penalties for fraud, negligence, and gross negligence in importing merchandise. Actions to collect penalties under 19 U.S.C. § 1592 ***may only be instituted . . . by the United States.***" [emphasis added] *Id.* at 896. So even if "The Act" were violated, the United States, not Sullivan, would be the only proper party to seek civil redress.

For the sake of uniformity of administration and enforcement, Congress chose not to allow a private civil remedy for violation of "The Act." Therefore, since Sullivan has no clearly articulated right to an implied civil remedy under § 1304, the first element of the *Cort* Test fails.

The Legislative History Does Not Suggest An Intent To Vest A Federal Right To Damages For Violation of § 1304

The legislative history of the Tariff Act of 1930 and specifically § 1304, its amendments and progeny, does not suggest that Congress ever intended to vest a civil cause of action for damages in a private individual such as Sullivan. Therefore, the second element of the *Cort* Test fails.

A Private Civil Cause of Action Will Not Further The Statutory Purpose

19 U.S.C. § 1304 specifically provides that its provisions are to be carried out and enforced by the Secretary of the Treasury. The Secretary is specifically given authority to adopt appropriate regulations for that purpose. As discussed elsewhere, the creation of a private, civil cause of action for violation of § 1304 can only create a "hodge-podge" of inconsistent enforcement, interpretations and results. In fact, the Secretary through the United States Customs Service has promulgated extensive regulations to uniformly implement and enforce § 1304. Importers can expect the same marking rules to apply whether they are importing merchandise in California, Hawaii or Alaska or through ports along the Gulf Coast or East Coast. The same Customs Service is promulgating and applying the same rules and regulations for marking imported merchandise all across the country. The statutory purpose requires uniformity of implementation, administration and enforcement of § 1304 and the entire Tariff Act of 1930 throughout the country. That purpose cannot be furthered by allowing private civil suits for damages.

Therefore, since Sullivan's claim for an implied civil remedy under § 1304 does not further its statutory purpose, the third element of the *Cort* Test must fail.

Sullivan's Claims Were Ones Traditionally Relegated to State Law

There is no dispute that the Sullivan claims for fraud, deceit and breach of contract are claims with which state

courts and juries are very familiar. Sullivan set forth in his complaint extensive allegations of fraud, deceit and breach of contract based on the alleged improper marking of the machine center by Mazak. As stated in his Petition For Writ of Certiorari, at pages 12 through 18, Sullivan offered extensive testimony at trial on the alleged improper marking, from Charles Sullivan, Josephine Sullivan and John Lampi in support of his state law claims.

At the conclusion of the evidentiary phase of the trial, the Court charged the jury on Sullivan's deceit claim concerning the marking issue as follows:

> "And in this case, Charles Sullivan in his deceit claim has alleged that the Defendant, Mazak Corporation, manufactured the machine center in Japan and imported it into this country and removed the, plaque or certificate on the side of the machine center saying it was manufactured in the United States.
>
> And I instruct you that you may only return a verdict in favor of the Plaintiff against the Defendant, Mazak Corporation, on the deceit claim if you are reasonably satisfied from the evidence that the entire machine was manufactured in Japan and then imported in its entirety to the United States and then had the, the plaque or the sign or the decal removed and another one substituted;
>
> Secondly, that Mazak did so with the knowledge of the falsity of its action or that it was so recklessly done that it amounted to knowledge of making the representation that it knew to be false.

> If, on the other hand, if you're reasonably satisfied from the evidence that major component parts of the machine center were manufactured in Japan and the parts were shipped to the United States and parts of the machine were manufactured in the United States and it was assembled in the United States, then the plaintiff would not be entitled to recover for deceit."

R-971 through R-972.

The essence of Sullivan's complaint was for recovery against Mazak for "garden variety" fraud, deceit and breach of contract claims that state court judges and juries handle every day. After hearing all the evidence about alleged false marking, changing decals, etc., the jury rejected Sullivan's claims against Mazak and returned a verdict in favor of Mazak and against Sullivan on its unjust enrichment claim. The jury's verdict was affirmed by the Alabama Supreme Court.

Sullivan has had a full and fair evidentiary hearing on the issue of the alleged false marking of the machine center by Mazak. The issues presented by his complaint are ones which are traditionally and commonly relegated to state courts and state law. Therefore, the fourth element of the *Cort* Test also fails.

CONCLUSION

Sullivan brings this petition because he is unhappy with the fact finding and decision of a duly constituted jury of his peers, affirmed by the Alabama Supreme Court, who ruled against him on his fraud, deceit and

breach of contract claims. The petition does not seek to advance any legitimate claim or right afforded under the United States Constitution or federal law. The relief Sullivan seeks for an implied civil remedy under 19 U.S.C. § 1304 would violate Article I, § 8, Cl. 1., of the Constitution, if allowed. The relief Sullivan claims also fails to satisfy the four point test of *Cort v. Ash*, 422 U.S. 66 (1975).

WHEREFORE, the jury has determined the facts, rendered its verdict and been affirmed; Sullivan's Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,

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